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No. 576

In the Supreme Court of the United States

OCTOBER TERM, 1931

JOHN T. CALLAHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court overruling a demurrer (R. 11–13) is reported *sub nom. United States* v. *Newton* in 36 F. (2d) 425. The opinion of the Circuit Court of Appeals (R. 203–207) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 29, 1931 (R. 208), and a petition for rehearing denied November 27, 1931 (R. 223). The petition for certiorari was filed De-

cember 16, 1931. While petitioner does not so state, he presumably invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner should have been prosecuted and sentenced under the National Prohibition Act instead of under Section 593 (b) of the Tariff Act of 1922.

STATUTES INVOLVED

The pertinent provisions of the Tariff Act of 1922 and of the National Prohibition Act are printed in the Appendix, *infra*, pp. 8–9.

STATEMENT

Petitioner was prosecuted upon the first count of an indictment returned in the United States District Court for the District of Delaware, which charged the importation of intoxicating liquor in violation of Section 593 (b) of the Tariff Act of 1922. (R. 5–6.) The count charged that certain named defendants, on November 10, 1927—

> did unlawfully, wilfully, feloniously, knowingly and fraudulently import and bring into the United States, and assist in importing and bringing into the United States, to wit, from St. Pierre-Miquelon, into the territorial waters of the District of Delaware * * * certain merchandise, contrary to law, to wit, a large quantity of intoxicating

> liquor, to wit * * * all of said intoxicating liquors containing more than one-half of one per centum of alcohol by volume and being fit for use for beverage purposes—in violation of the Provisions of Section 593, Subdivision B of the Act of Congress of September 21, 1922, known as the Tariff Act of 1922 * * *.

The count then alleged that the importation was illegal in that the merchandise was brought into the United States:

> (*a*) Without a permit from the Commissioner of Internal Revenue as required by Schedule 8 of the Tariff Act of 1922.
>
> (*b*) Without payment of the customs duties thereon as required by the aforesaid schedule.
>
> (*c*) And in that said merchandise was imported and brought into the United States in violation of Section 3, Title II, of the National Prohibition Act.

In a separate paragraph of the count petitioner was charged with aiding and abetting the other defendants in the alleged offense. (R. 6.) The second count of the indictment was dismissed by the United States Attorney at the trial. (R. 7–8, 165.)

A demurrer filed by the petitioner was overruled, the trial court holding that insofar as the allegations of paragraph (c) were concerned, the indictment stated an offense. (R. 9–13.)

The case, therefore, went to the jury upon the allegations of the first count charging the petitioner

with aiding and abetting the importation of intoxicating liquor contrary to the provisions of Section 3, Title II, of the National Prohibition Act, and therefore "contrary to law." Petitioner was convicted (R. 180) and sentenced to the penitentiary for a year and a day and to pay a fine of $2,500. (R. 194.) Upon appeal the conviction was affirmed (R. 207–208) and a petition for rehearing denied (R. 223).

ARGUMENT

The only contention presented in the petition for certiorari and supporting brief which was urged in the trial court or in the Circuit Court of Appeals (R. 10, 12, 205–207) is thus stated by the District Court in its opinion overruling petitioner's demurrer (R. 12):

> The theory upon which the defendant attacks the third allegation is that The National Prohibition Act not only prohibits the importation of intoxicating liquor but provides a penalty for so doing, that the penalty of this earlier special statute was not repealed by the later general statute, Section 593 (b) of The Tariff Act of 1922, and that, hence, importation of intoxicating liquor in violation of The National Prohibition Act is not a violation of Section 593 (b).

Section 3, Title II of the National Prohibition Act (*infra*, p. 9), so far as pertinent, prohibits the importation of intoxicating liquor for beverage purposes. That section contains no penalty pro-

vision, but it is provided in Section 29, Title II, (*infra,* p. 9) that any person who "violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500."

Section 593 (b) of the Tariff Act of 1922 (*infra,* p. 8) makes it an offense for any person fraudulently or knowingly to import or bring into the United States, or to assist in so doing, any merchandise, "contrary to law," and provides as a penalty that "such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both." The Act defines "merchandise" as meaning "goods, wares, and chattels of every description and includes merchandise the importation of which is prohibited" (Sec. 401, 46 Stat. 708) and Schedule 8, which imposes certain duties on spirits, wines, and other beverages, provides (Par. 814, 46 Stat. 640) that—

> No wines, spirits, or other liquors or articles provided for in this schedule containing one-half of 1 per centum or more of alcohol shall be imported or permitted entry except on a permit issued therefor by the Commissioner of Prohibition, and any such wines, spirits, or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the customs laws: * * *

and that (Par. 801 (a), 46 Stat. 639):

> Nothing in this schedule shall be construed as in any manner limiting or restricting the provisions of Title II or III of the National Prohibition Act, as amended.

The phrase "contrary to law" has been construed as embracing "any law in force at the time of an alleged violation of the statute, whether contrary to Customs Laws or, as in this instance, to the National Prohibition Act." *Bookbinder* v. *United States*, 287 Fed. 790, 795 (C. C. A. 3d), and cases cited (certiorari denied 262 U. S. 748).

The District Court, in deciding against petitioner, said (R. 12):

> It is, of course, well settled that a later statute, general in its terms, and not expressly repealing a prior special statute will ordinarily not affect the special provisions of such earlier statute. *Ex parte Crow Dog*, 109 U. S. 556, 570; *Simon* v. *Simon*, 26 Fed. (2d) 530, 532, 26 A. & E. Enc. of Law, 2d Ed. 739. But The National Prohibition Act prescribes no special penalty for importations in violation of that law. Instead, Section 29 of Title 2 of the Act contains an omnibus clause fixing penalties for violations for which no special penalty is fixed. As the subsequent Tariff Act of 1922 fixes a special penalty for importations of intoxicating liquors contrary to law, its provisions supersede, with respect to that offense, the omnibus clause of The National Prohibition Act.

Kurczak v. *United States*, 14 Fed. (2d) 109 (C. C. A. 6); *United States* v. *Cardwell*, 9 Fed. (2d) 146; *Nounes* v. *United States*, 4 Fed. (2d) 833 (C. C. A. 5).

We submit that the result reached in this decision is entirely sound.

In affirming the decision of the trial court the Circuit Court of Appeals relied upon its construction of the Willis-Campbell Act and upon the decision of this Court in *United States* v. *Stafoff*, 260 U. S. 477. We deem it unnecessary to discuss this view of the case, since it seems entirely clear that the result reached by the District Court was correct for the reasons stated.

CONCLUSION

We know of no conflicting decisions and submit that the case was correctly decided below. The petition should be denied.

Respectfully submitted.

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JANUARY, 1932.

APPENDIX

STATUTES INVOLVED

Section 593 (b) of the Tariff Act of 1922 provides in part:

> If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both. * * * (Act of September 21, 1922, c. 356, Title IV, 42 Stat. 858, 982; U. S. C., Title 19, Sec. 497.)

The above section was repealed as of June 18, 1930, by the Tariff Act of 1930, c. 497, Secs. 651 (a), 653, 46 Stat. 590, 762 (U. S. C. Sup. V, Title 19, secs. 1651, 1653), but Section 651 (c) of that Act (p. 763) provided that—

> * * * All offenses committed and all penalties, under any statute embraced in, or changed, modified, or repealed by this Act may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed. * * *

A provision identical in language with that quoted above from Section 593 (b) of the Tariff Act of 1922 was included in the Tariff Act of 1930. (Sec. 593 (b), c. 497, 46 Stat. 751; U. S. C. Sup. V, Title 19, sec. 1593.)

Section 3, Title II, of the National Prohibition Act, is in part as follows:

> No person shall * * * import * * * any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> Liquor for nonbeverage purposes * * * may be * * * imported * * * but only as herein provided, and the commissioner may, upon application, issue permits therefor * * *. (Act of October 28, 1919, c. 85, Title II, 41 Stat. 305, 308; U. S. C., Title 27, Sec. 12.)

Section 29, Title II, of the National Prohibition Act, reads in part:

> * * * * *
>
> Any person violating the provisions of any permit * * * or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500 * * *. (41 Stat. 316; U. S. C., Title 27, Sec. 46.)

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